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No. 07-1356

IN THE

Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

DONNIE RAY VENTRIS,

Respondent.

On Writ of Certiorari
to the Supreme Court of Kansas

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 11,500 attorneys, in addition to more than 28,000 affiliate members from all fifty states. Founded in 1958, NACDL is the only professional bar association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice, including issues involving the Bill of Rights. NACDL files approximately thirty-five *amicus* briefs each year on various issues in this Court and other courts.

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[1] Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Petitioner has filed a global consent to *amicus* filings, and a letter of consent to the filing of this brief from respondent has been lodged with the Clerk of the Court pursuant to Rule 37.3.

SUMMARY OF ARGUMENT

Kansas seeks a blanket rule that "criminal defendants' voluntary statements should be admissible for impeachment purposes," Pet. 18, on the ground that impeachment via such statements serves "the fundamental purpose of our adversary system—to seek the truth." Petr. Br. 22. But Kansas ignores a foundational element of truth-seeking: reliability. Statements used for impeachment cannot advance the truth if they are unreliable in the first place. And the particular kind of statement at issue in this case – a jailhouse snitch's uncorroborated claim that the defendant confessed to him – is notoriously unreliable. Accordingly, whatever the general rule may be with respect to whether voluntary statements secured in violation of the Sixth Amendment are admissible for impeachment purposes, this Court should hold here that the Constitution forbids the introduction of uncorroborated snitch testimony for this purpose.

I. In criminal cases, the reliability of assertions that defendants have made incriminating statements varies depending on the circumstances surrounding the alleged statements. On one end of the spectrum, confessions made in open court have several indicia of trustworthiness because they are made by the defendant, under oath, in front of a judge and jury and with counsel present. When a police officer swears that a defendant has voluntarily confessed, still other relevant safeguards attach: officers receive training designed to insure that the statements they receive are both reliable and obtained

constitutionally. Finally, disinterested citizen-witnesses have little motive to lie about a defendant's statements.

At the other end of the spectrum lie accomplices and jailhouse informants, commonly known as "snitches." Admitted criminals themselves, they have strong motives to lie. And while accomplice testimony retains at least some indicia of reliability, because the accomplice inculpates herself in the process, snitch testimony lacks even this form of corroboration.

The problems posed by snitch testimony are especially pernicious in the cases in which reliability matters the most – for example, cases in which the evidence absent the snitch testimony is thin, or those that hinge on the jury's choosing between conflicting in-court testimony by the defendant and another witness. Yet it is precisely these kinds of cases in which prosecutors may be particularly inclined to emphasize snitch testimony or to actively recruit a snitch to secure a conviction.

Generally, snitches have incentives to fabricate testimony in the hopes of currying favor with prosecutors and receiving benefits – such as improved prison conditions, a reduced sentence, or dropped charges. As a result, some snitches go to extraordinary lengths to learn about open cases, locate defendants, and fabricate their confessions. These snitches face strong incentives to produce statements that will help the prosecution, even if that means falsifying them. Worst of all are snitches who are repeat offenders, handpicked by the police to share a jail cell with the defendant and to obtain confessions. These career snitches have little to lose,

and much to gain, from falsifying testimony, and they may be most willing to perjure themselves.

II. The criminal justice system is ill-equipped to ensure the reliability of snitches or to detect perjured testimony. Prosecutors may be pre-disposed towards a defendant's guilt and therefore inadequately skeptical of snitch testimony. Defense counsel are hard-pressed to remedy these problems, because they cannot monitor clients while they are in jail or moving from cell to cell. And once the case goes to trial, defense counsel are hampered in either conveying fully to the jury the strong motives that snitches have to lie or otherwise rebutting snitch testimony.

III. Recognizing just these problems of unreliability, many states now require corroboration for accomplice testimony, which is less dangerous but more prevalent. At a minimum, snitch testimony should be admissible for impeachment purposes only if it satisfies similar corroboration requirements.

ARGUMENT

Kansas's argument that snitches should be permitted to testify about confessions purportedly made to them rests on the hypothesis that defendants actually make incriminating statements to snitches, that snitches accurately remember and relay those statements, and that, as a result, snitch testimony is truthful. Based on this assumption, the State argues that snitch testimony furthers the truth-seeking process. This analysis, however, cannot withstand scrutiny, as snitch testimony is often fabricated and unreliable.

I. Snitches Are Particularly Likely To Provide Unreliable Testimony About Defendants' Purported Confessions In Light Of The Incentives They Face.

Snitches are often recidivists, who are inherently unreliable individuals. In addition, snitches are given strong incentives to lie through the promise of dropped charges, reduced sentences, or jailhouse benefits. Some are even put in a position to frame another individual for a crime they themselves committed. The result – untrustworthy recidivists faced with strong incentives to lie – leads to testimony that is often false and that undermines, rather than furthers, the truth-seeking process.

A. "Career Snitches" Pose A Special Threat To Reliability.

Career snitches, by definition, are individuals who disregard legal obligations: if they were not charged repeatedly with violating the law, they would not find themselves so often in jail in the first place. As a result, their testimony is inherently suspect and self-interested.

By definition, "[a]ll jail house informants are incarcerated. They necessarily are charged with, or have been convicted of, a crime. These crimes include the most serious and often heinous crimes." REPORT OF THE 1989-90 LOS ANGELES COUNTY GRAND JURY, INVESTIGATION OF THE INVOLVEMENT OF JAIL HOUSE INFORMANTS IN THE CRIMINAL JUSTICE SYSTEM IN LOS ANGELES COUNTY 9 (June 16, 1990) [hereafter GRAND

JURY REPORT].[2] Not only are snitches by implication criminals, but a majority of them have "recidivistic tendencies." *Id.* at 10. They thus frequently find themselves in jail, faced with the prospect of increasingly longer sentences as a result of their recidivism.

As some recidivists spend time in jail, they become "career snitches," who have learned how to manipulate the system to their advantage and provide falsified testimony most effectively. Once recidivists have established themselves as persuasive snitches, the police sometimes use them repeatedly, even after learning that they have falsified testimony in prior cases. For example, after one snitch was diagnosed as a pathological liar, the police continued to use him several more times. GRAND JURY REPORT, *supra*, at 16. Some police departments even have holding cells called an "informant tank" in which known snitches are kept. ROBERT M. BLOOM, RATTING 66 (2002). When the police need more evidence against an individual, the detective on the case will request that his suspect be placed in the informant tank. *Id.*; *see also, e.g.*, Br. of Resp. 2-3,

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[2] In 1989 to 1990, in the wake of an admission by one career snitch, Leslie White, that he had repeatedly fabricated testimony in prosecutions of other individuals, a grand jury in Los Angeles County conducted an extensive investigation into the use of jailhouse informants. ROBERT M. BLOOM, RATTING 65 (2002). The grand jury issued a report that summarized the results of its investigation and "recommend[ed] policies and procedures . . . [to] prevent or curtail the emergence of" problems relating to the use of snitch testimony in the future. GRAND JURY REPORT, *supra*, at 5.

Van de Kamp v. Goldstein, *cert. granted*, 128 S. Ct. 1872 (2008) (No. 07-854) (prosecutor acknowledged that murder case "was filed in great haste" but emphasized that "[f]iling officers . . . [had] assure[d him] that it will get stronger"; police then purposely placed a career snitch in the defendant's cell, and the snitch reported an alleged confession the next day) (citing J.A. 29, 30, 37-39)).

B. Snitches Have Strong Incentives To Lie.

Because testifying for the prosecution promises remuneration, reduced sentences, and other benefits, snitches face strong – and sometimes irresistible – incentives to lie.

1. The Los Angeles grand jury investigation revealed that "in the vast majority of cases it is a benefit, real or perceived, for the informant or some third party that motivates the cooperation." GRAND JURY REPORT, *supra*, at 12. That expectation is well placed, as virtually all snitches receive some benefit – ranging from reduced sentences and release to better conditions of confinement – in exchange for their testimony. *Id*. While these benefits may influence all snitches, career snitches benefit even more fully. After their testimony (valid or not) yields them benefits or even a ticket out of jail, they are more likely to provide testimony in the future, when they once again face the prospect of punishment and see an opportunity to cut a deal.

For snitches, "the ultimate reward" is to be "release[d] from custody" in exchange for their testimony. GRAND JURY REPORT, *supra*, at 12. Prosecutors may drop charges pending against a snitch who testifies, thereby allowing him to avoid

not only jail time but also a record. *See* NORTHWESTERN CENTER ON WRONGFUL CONVICTIONS, THE SNITCH SYSTEM 13 (2004-2005) [hereinafter THE SNITCH SYSTEM] (discussing the case of Darryl Moore, who – as discussed below, *see infra* at 13-14, had pending drug and weapons charges dropped in exchange for his testimony and was immunized from prosecution despite admitting to involvement in contract murder case).

Snitches who are already serving time often have their sentences reduced in exchange for their testimony. For example, a snitch who testified against Charles Fain – who was charged with rape and murder in 1983 – had been facing 230 years in prison before he testified. After testifying, some of the charges against him were dropped and others were reduced; he was released just three years later. Hans Sherrer, *Charles Fain Proved Innocent of Murder, and Released After Almost 18 Years On Idaho's Death Row,* FOREJUSTICE, *available at* http://forejustice.org/wc/charles_fain.htm. As a result of these snitches' testimony, Fain was sentenced to death and spent nearly eighteen years on death row before being exonerated by DNA evidence. The Innocence Project, *Know the Cases, Charles Irvin Fain*, http://www.innocenceproject.org/Content/149.php. Ventris's case illustrates this very point: the informant Doser was in jail because he had violated his probation and was facing the possibility of prison time, but prosecutors recruited him and agreed to release him from probation in exchange for his testimony against respondent. BIO 3.

Finally, while serving their sentences, snitches can also avail themselves of other benefits that

improve their day-to-day lives, such as "added servings of food . . . extra phone call[s], visits, food or access to a movie or television." GRAND JURY REPORT, *supra*, at 12.

The expectation of this quid pro quo is engrained in the snitch's mind. Snitches fully expect to receive some benefit for any cooperation they give. This point was borne out by the L.A. County grand jury investigation, which interviewed or heard testimony from twenty-five snitches to gain additional insight into how the snitch system had operated. Although the investigation's staffers explicitly told the snitches that they had no ability to secure reduced sentences, some snitches nonetheless continued to "request[] further contacts" with those very staffers in the hope of garnering some benefit for their testimony. GRAND JURY REPORT, *supra,* at 22 n.12.

2. As the courts have long recognized, the benefits provided to snitches create strong incentives to lie. Chief Justice Warren stated that the incentives facing snitches result in "a serious potential for undermining the integrity of the truth-finding process in the federal courts." *Hoffa v. United States*, 385 U.S. 293, 320 (1966) (Warren, C.J., dissenting); *see also* Judge Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 HASTINGS L.J. 1381, 1394 (1996). The Fifth Circuit has also noted that "[i]t is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence." *United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir.

1987).[3] *See also* GRAND JURY REPORT, *supra*, at 10-11 (concluding that "[t]he myriad benefits and favored treatment which are potentially available to informants are compelling incentives for them to offer testimony and also a strong motivation to fabricate, when necessary, in order to provide such testimony").[4]

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[3] *See also Jackson v. Brown*, 513 F.3d 1057, 1077-78 (9th Cir. 2008) (affirming grant of habeas relief as to "special circumstances" finding in capital case based on testimony from two snitches who had falsely claimed that they had not received any benefits because "[c]orrecting the informants' perjury would have shown that each of these witnesses had a strong incentive to lie in order to secure Jackson's conviction"); *Zappulla v. New York*, 391 F.3d 462, 470 n.3 (2d Cir. 2004) ("Several reports have found that jailhouse informants have a significant incentive to offer testimony against other defendants in order to curry favor with prosecutors and that the proffered testimony is oftentimes partially or completely fabricated. Thus, the use of jailhouse informants to obtain convictions may be one of the most abused aspects of the criminal justice system.") (citations and internal quotation marks omitted); *United States v. Meinster*, 619 F.2d 1041, 1045 (4th Cir. 1980) (deeming "it obvious that promises of immunity or leniency premised on cooperation in a particular case may provide a strong inducement to falsify in that case").

[4] In 1996, a Canadian commission formed to investigate the use of jailhouse informants concluded that "[i]n-custody informers are almost invariably motivated by self-interest. They often have little or no respect for the truth of their testimonial oath or affirmation. Accordingly, they may lie or tell the truth, depending only upon where their perceived self-interest lies. In-custody confessions are often easy to allege and difficult, if not impossible, to disprove." HON. FRED KAUFMAN, THE COMMISSION ON PROCEEDINGS INVOLVING GUY PAUL MORIN [hereinafter THE MORIN COMMISSION] 599 (Ont. Ministry of the Att'y Gen. 1998).

3. In addition to the benefits that snitches in general receive in exchange for their testimony, some snitches have an additional incentive to lie: they are the actual perpetrators of the crime at issue, and concocting a false confession shifts the prosecution's focus away from them. *See* THE SNITCH SYSTEM, *supra*, at 3. With personal knowledge of the crime, perpetrator-snitches are particularly well-placed to fabricate a convincing "confession" that describes how the crime was committed and thereby frame another individual for the crime.

Framing a stranger is often a more attractive option than implicating an accomplice, for two reasons. First, a co-defendant is often a friend of the snitch. Second, by implicating a co-defendant, a snitch is by extension implicating himself.

4. The many incentives that motivate a snitch to lie take on even greater significance when combined with the fact that snitches face little risk from testifying falsely. Snitches who lie "are rarely, if ever, prosecuted [and therefore,] informants realize they have little to lose by testifying falsely." BLOOM, *supra,* at 65. In Los Angeles County, for example, despite "[a]n appalling number of instances of perjury or other falsifications to law enforcement," investigators "failed to identify a single case of prosecution of an informant for perjury or for providing false information." GRAND JURY REPORT, *supra,* at 18, 90.

5. The incentives for false testimony potential snitches face are further exacerbated when snitches are affirmatively recruited by the police. In such a scenario, the pressure placed on a would-be informant can be overwhelming: the snitch fears

retaliation if she fails to return with the confession she was recruited to obtain.

In some cases, snitches may be pressured into working with police to ensure their own safety. For instance, in one case prison officials made numerous announcements suggesting that an inmate was an informant to force him to "seek the security provided by protective custody offered to informants," in the hope that he would eventually "begin to perform as an informant." GRAND JURY REPORT, *supra*, at 21. In another case, police promised a snitch benefits and allegedly threatened him with torture unless he provided evidence to implicate targets of an investigation. *Id.* at 23. After showing the snitch crime scenes and police files, police provided the snitch with statements for him to repeat while being recorded, claiming all along that he heard the primary suspects of the crime make these fabricated statements. *Id.* A third snitch "was stripped of his protective status" after he refused to continue cooperating. *Id.* at 24.

In contrast to the variety of benefits provided to snitches for testifying on behalf of the prosecution, there are few incentives for snitches to come forward with exculpatory information. Prosecutors are unlikely to offer any favorable treatment to individuals who come forward with statements that undercut the prosecution's case. And defense counsel and their clients can almost never provide any reward to such informants.

6. The literature confirms that the irresistible incentives to lie lead snitches to fabricate confessions. Consider the history of one prototypical snitch, Leslie White. JIM DWYER ET AL., ACTUAL INNOCENCE 165-67

(2000). As a habitual offender, he frequently looked for opportunities to obtain reduced sentences or prison privileges. BLOOM, *supra,* at 63-66. White provided testimony both while he was serving time in prison and while he awaited trial. Ultimately, he admitted that he had repeatedly fabricated the confessions to which he had testified. White was an expert at getting the information necessary to fabricate a confession. Among other things, he would use a phone at the jail to call various government agencies, impersonating government officials to obtain information about pending cases. *See* DWYER, *supra,* at 166. He would then use this information to construct a purported confession by the suspected inmate. After fabricating this confession, White would then go through the process of "booking" the inmate by telling other informants the same story so that they could corroborate the testimony by claiming to have heard the same confession. As with many snitches, White's testimony was often particularly harmful because the government would otherwise have lacked enough evidence to secure a conviction. BLOOM, *supra,* at 65.

Another example is Darryl Moore, a repeat offender with a record of violent crime. As one state's attorney described Moore, "[f]or money Mr. Moore either beats people, maims them, or, if need be, he will kill them for the right price." THE SNITCH SYSTEM, *supra*, at 13. Moore's testimony was so untrustworthy that his own mother once took the stand for the defense, testifying that Moore should not be trusted under oath. Although prosecutors in Illinois were well aware that Moore was unreliable, they nonetheless continued to use him as an

informant and agreed to cut a deal with him. In exchange for his testimony against an alleged drug kingpin, Illinois paid Moore, dropped pending drug and weapons charges against him, immunized him from prosecution for his admitted involvement in a contract murder case, and released him. Moore eventually recanted and claimed that he knew nothing about the subject of his prior testimony, and indeed, that the prosecution had paid him to lie. *Id.*

Obviously, fabricated confessions cannot further the truth-seeking process. Instead, they result in unreliable convictions of innocent defendants. Consider, for example, Dennis Fritz and Ron Williamson, who were charged with murder years after the crime occurred. The Innocence Project, *Know the Cases, Dennis Fritz*, http://www.innocence project.org/Content/152.php. The case against the two men depended almost entirely on snitch testimony: none of the myriad fingerprints at the crime scene belonged to either man, and although the hairs at the scene supposedly "matched" Fritz and Williamson's, the prosecutors knew this evidence alone was insufficient to obtain a conviction. DWYER, *supra*, at 175, 177. Based primarily on snitch testimony, both men were convicted of murder, with Fritz sentenced to life in prison and Williamson sentenced to death. *Id.* at 178-79, 183, 186. Finally, after spending twelve years in prison, both men were exonerated by DNA evidence, which proved not only that they were not the perpetrators, but that one of the prosecution's other informants, Glen Gore, had actually committed the murder. *Id.* at 201-02. And this case is hardly an aberration: One study of capital case exonerations found that incentivized testimony

was "the leading cause of wrongful convictions," responsible for forty-five percent of them. THE SNITCH SYSTEM, *supra*, at 3.

II. The Adversarial Process Does Not Cure The Unreliability Of State-Recruited Snitch Testimony.

The problems that snitches pose are not addressed adequately by the adversarial system. Prosecutors can be unable or even unwilling to assess snitch testimony properly. Defense counsel lack the ability to protect their clients from snitches before trial or to effectively impeach snitches' testimony at trial.

A. Prosecutors Cannot Adequately Screen The Reliability Of Snitch Testimony.

Prosecutors often face special temptations and difficulties when presented with a purported confession obtained by a snitch.

1. Whether a snitch testifies at trial turns ultimately on whether the prosecutor believes the informant's testimony to be credible. Prosecutors tend to be confident in their ability to judge truthfulness and often think it is just "a 'matter of common sense.'" Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 943 (1999). But prosecutors face special problems in determining the truthfulness of jailhouse snitches.

Ironically, prosecutors have the strongest incentives to rely on snitches in cases in which they are least able to ensure veracity. "[I]n most situations a cooperator's value increases in inverse

proportion to the [other] information in possession of the prosecutor." Steven M. Cohen, *What is True? Perspectives of a Former Prosecutor*, 23 CARDOZO L. REV. 817, 822 (2002). Snitch testimony is most valuable when the prosecutor otherwise has a weak case – for example, when there is little to no physical evidence and no eyewitness testimony – both because the prosecutor needs evidence and because the lack of other sources of information makes it more difficult for a defendant to rebut informant testimony. And sometimes prosecutors must choose between relying on unreliable snitch testimony and dropping charges altogether. For example, in the case of Dennis Fritz, *see supra* at 14-15, the snitch came forward with his testimony only one day before prosecutors would have been forced to drop charges for lack of evidence. The Innocence Project, *Know the Cases, Dennis Fritz*, http://www.innocenceproject.org/Content/152.php.

Especially in cases involving serious crimes, and therefore high stakes, prosecutors will be tempted to supplement thin evidence with snitch testimony. Thus, it is not surprising that reliance on incentivized testimony is the "leading cause of wrongful convictions" in capital cases. THE SNITCH SYSTEM, *supra*, at 3. For example, in the case of Gary Gauger, who was convicted and sentenced to death for the murder of his parents in 1994, prosecutors needed testimony to corroborate a disputed confession to the police that occurred after hours of interrogation. So they relied on Raymond Wagner, a convicted felon and snitch, to testify that Gauger had also confessed to him. The true killers later admitted to the murders and were convicted. Gauger received a gubernatorial pardon based on actual innocence in

2002, six years after his conviction had been reversed on other grounds. *Id.* at 9; Northwestern Center on Wrongful Convictions Website, *Gary Gauger*, *available at* http://www.law.northwestern.edu/wrongfulconvictions/exonerations/ilGaugerSummary.html; *see also* C. Blaine Elliott, *Life's Uncertainties: How to Deal with Cooperating Witnesses and Jailhouse Snitches*, 16 CAP. DEF. J. 1 (2003) (describing the case of Earl Bramblett, who was sentenced to death and executed, based in part on testimony by a snitch who later recanted); GRAND JURY REPORT, *supra*, at 37 (referring to a survey showing that snitches were used in approximately one-third of an extensive sample of cases in which defendants were sentenced to death).

In these cases involving thin evidence, "[the] very lack of evidence tends to make it much more difficult to evaluate the veracity of the would-be cooperator." Cohen, *supra*, at 822. Corroboration becomes even more difficult when an informant's testimony includes few details about the alleged crime, but instead only vague statements – such as "the defendant told me he pulled the trigger" – that are "easy to make but extremely difficult . . . to disprove." THE MORIN COMMISSION, *supra*, *Recommendations*, No. 41, ¶ 2, at 13. Again, this case offers an illustration: the snitch testified simply "that the Hicks robbery 'went sour' and that Ventris shot Hicks before robbing him of money, keys, and a vehicle." Petr. Br. 3.

Even when a snitch provides more details regarding the crime, that may be no indication of veracity. Snitches have a variety of ways to "obtain the necessary information about another prisoner's

pending charges in order to convincingly fabricate a confession." Christopher Sherrin, *Jailhouse Informants, Part I: Problems With Their Use*, 40 CRIM. L.Q. 106, 113 (1998). Snitches can gather the information necessary to fabricate a false confession "from law enforcement officials, the media, [or even from] the defendant himself," even when he has denied, rather than confessed to, a crime.[5] *Id.* at 113-14 (citing GRAND JURY REPORT, *supra*, at 27-31); Yaroshefsky, *supra*, at 959-61 (describing how prosecutors have sometimes communicated key information to witnesses during proffer sessions). And snitches have especially good access to such information in high-profile cases, which receive greater media coverage. Also, when – as in this case – the State puts an informant in the defendant's cell, prosecutors are particularly likely to have provided the snitches with at least some of the very information they need to create untruthful testimony.

The danger posed by unreliable snitch testimony is not minimized by limiting its use to impeachment purposes. In cases involving thin evidence and no eyewitness testimony, the possibility that a defendant will testify is – the State's suggestion in its opening brief notwithstanding – neither "remote [nor] highly speculative." Petr. Br. 25. To the contrary, in

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[5] Some defense counsel even refuse to leave case materials with clients who are being held pending trial because of the possibility that a snitch will rely on such materials to conjure up a false confession, despite the added difficulties that this decision poses to preparing for trial. *See* Sherrin, *supra*, at 119-20.

cases such as this one, in which two individuals have flatly inconsistent stories, as a realistic matter the defendant is often forced to testify, and his credibility is central to the case. Thus, the cases in which prosecutors are most likely to use snitch testimony may be the very cases in which defendants are most likely to want to take the stand and thus to be either impeached or deterred from testifying by untruthful informant testimony.

2. The particular problems that snitches present are compounded by the already serious challenges to ensuring reliability of cooperating witnesses in general. Because of the paucity of details that typically accompany snitch testimony, "the prosecutor is forced to rely to a greater extent on his 'gut reaction' than on tangible evidence." Cohen, *supra*, at 822. Yet in judging the reliability of any informant, prosecutors' assessments will be "no doubt coloured by their genuine views on [the defendant's] guilt; as a result, evidence which undermine[s] the informants [will be] more easily discarded and largely inconsequential evidence [will] be[come] confirmatory." THE MORIN COMMISSION, *supra*, *Executive Summary*, at 10. Similarly, a prosecutor's ability to judge the credibility of testimony is compromised if the prosecutor becomes invested in a particular informant, particularly if the consequence of coming to doubt his veracity in a current case would call into question the validity of prior convictions that depended on the snitch's testimony. This phenomenon, "known by prosecutors as 'falling in love with your rat,'" diminishes a prosecutor's necessary level of skepticism. Yaroshefsky, *supra*, at 944.

Consequently, prosecutors can develop a form of "tunnel vision" and thus too readily regard snitch testimony as credible. *See* THE MORIN COMMISSION, *Executive Summary*, *supra*, at 11. The investigation in Canada of the wrongful conviction of Guy Paul Morin for murder provides a particularly striking example. After Morin was exonerated by DNA evidence, a commission formed to investigate the causes of his wrongful conviction identified unreliable snitches as a primary factor. *Id.* at 1-3, 14. But even after Morin had been exonerated, the lead prosecutor in the case continued to believe a snitch's testimony that Morin "concocted a false alibi," despite all evidence to the contrary. *Id*. at 11. This willful blindness is all the more likely in cases such as this one, involving a state-recruited snitch, because the prosecutor or his law-enforcement colleagues handpick an inmate to serve as an informant and therefore have a personal stake in continuing to believe in him. No prosecutor wants to acknowledge that he has been duped by a rogue snitch.

Even without such tunnel vision, "as a general rule, people are poor human lie detectors." Saul M. Kassin, *Human Judges of Truth, Deception, and Credibility: Confident but Erroneous*, 23 CARDOZO L. REV. 809, 809 (2002) (citing Bella M. Depaulo *et al.*, *The Accuracy-Confidence Correlation in the Detection of Deception*, 1 PERSONALITY & SOC. PSYCHOL. REV. 346 (1997)). And this "general rule" applies equally to trained professionals, who have proved to be only marginally better than the average person at judging truthfulness. *See id.* at 811 (untrained college students accurately judged truthfulness 52.8% of the time, compared with accuracy rates of 55.8% for

police detectives, 55.7% for CIA, FBI, and military polygraph examiners, and 56.7% for trial judges). Moreover, training in particular techniques intended to increase accuracy in judging truthfulness instead increases only false confidence in those judgments and not their accuracy. *Id.* at 813-14.

B. Defense Counsel Are Unable Effectively To Rebut Unreliable Informant Testimony.

Although defense counsel have strong incentives to challenge snitches' reliability, they are especially disadvantaged in combating unreliable snitch testimony. At trial, defense counsel often cannot adequately rebut snitch testimony. And prior to trial, defense counsel are largely powerless to stop a snitch from inventing a false confession. Even putting aside purely fabricated snitch stories, defense counsel can do little to combat the coercive atmosphere of prison, which may induce a defendant into making untrue but self-incriminating statements.

1. At trial, defense counsel face significant disadvantages in impeaching unreliable snitch testimony. "Due to the frequent movement of prisoners, the difficulties encountered in investigating" the circumstances surrounding "jail house confessions are severe and become nearly impossible with the passage of time." GRAND JURY REPORT, *supra*, at 44. Thus, much of a defense counsel's cross-examination must focus on the snitch's incentives to lie.

However, defense counsel frequently find it just as difficult to establish what benefits a snitch has received in exchange for testimony. GRAND JURY

REPORT, *supra*, at 39. This difficulty is particularly likely to arise when agreements between prosecutors and snitches have not been reduced to writing, but are only implicit or inchoate. *Id.* As a result of such tacit arrangements, "[t]he entire circumstances regarding benefits and the expectation of benefits, in many cases, are not adequately presented to the judge or jury for them to have the necessary factual basis to evaluate the testimony of the informant." *Id.* at 76.

For example, in one case, a snitch who testified that the defendant had confessed to him also "testified that he had asked for nothing and that the District Attorney would not even discuss favorable treatment with him." GRAND JURY REPORT, *supra*, at 76-77. However, "[w]ithin a day of this testimony," the snitch gave the prosecutor "a sample form for a letter he wished written to the Department of Corrections requesting an early release." *Id.* at 77. Precisely because the letter was ultimately sent only after the defendant was convicted, "[t]he jury was never apprised of this request"; instead, it "was advised that benefits are not awarded for testimony." *Id.*

Moreover, less formal benefits may be especially difficult to discover. Unlike dropped charges, defense counsel are unlikely to learn of benefits involving conditions of confinement such as preferential treatment or relaxation of jail rules. GRAND JURY REPORT, *supra*, at 12; *see also id.* at 12-15; *see supra* at 23. As a result, defense counsel will rarely be able to communicate to a jury the full scope of incentives granted to inmates who provide incriminating testimony.

This confluence of factors increases the "difficulty of the defen[s]e to disprove [a snitch's] claims to a confession" and makes the use of snitch testimony "a 'ready recipe for disaster.'" Steven Skurka, *A Canadian Perspective on the Role of Cooperators and Informants*, 23 CARDOZO L. REV. 759, 762 (2002) (quoting THE MORIN COMMISSION, *supra*, *Executive Summary*, at 14). Such witnesses often have strong incentives to lie and all the means to do so, and yet in any given case, defense counsel may be unable to expose these sources of unreliability to the jury. As a result, at the very least, the snitch's testimony seriously compromises the credibility of the defendant's testimony, and therefore his case.

2. While defense counsel are hampered in their ability to rebut snitch testimony at trial, they can do even less to avoid the snitch-generated creation of confessions in the first instance. Any competent defense counsel will of course advise her client not to discuss his case outside the lawyer's presence with anyone, and certainly not with a stranger with whom he is sharing a jail cell. But regardless of his lawyer's advice, a defendant cannot avoid being placed in physical proximity to an informant who is willing simply to fabricate false testimony. "Some informants were so notorious that defendants, who would find themselves even momentarily in a holding cell with them, were reported to say 'Get me out of here, get me away from him,' knowing that even slight exposure would make the defendant vulnerable to a falsely claimed confession." THE MORIN COMMISSION, *supra*, at 567-68 (citing GRAND JURY REPORT, *supra*). Most snitches are not so notorious but they may be even more dangerous because a

defendant has no way to know that he should try to avoid them. And as discussed above, such snitches are perfectly capable of making up false confessions that are convincing to prosecutors and juries alike. *See supra* Part II.A.

Additionally, the ever-present danger of false snitch testimony materializing at the last moment impedes the truth-seeking function for an independent reason: it interferes with defense counsel's ability to prepare and present their strongest case. Because snitch testimony is so damaging and difficult to rebut, defense counsel may decide for strategic reasons not to have the defendant testify if a snitch materializes and is available for impeachment. Therefore, the possibility of snitch testimony may dissuade a defendant from taking the stand even when he otherwise might have done so. And defense counsel may learn of such a snitch only just before trial, as snitches often come forward only at the last second.

3. A defense counsel's advice to avoid discussing the charged offense could be rendered irrelevant for another reason that further undermines the reliability of any resulting statements. Petitioner recognizes the problems for reliability posed by coerced confessions, yet paradoxically argues that the risk of coercion is less in cases of snitch testimony than in cases of police testimony. Petr. Br. 32-35. But this argument actually turns the dynamic on its head.

First, the State ignores the inherently coercive atmosphere in prison. Experts recognize that "even when an informant accurately reports a confession by another inmate, that confession may be unreliable

because it was coerced or induced." Sherrin, *supra*, at 115. In fact, snitches, who are presumably in jail because they already have shown a disregard for the law, likely are more inclined to use illegal or coercive means to obtain a confession than police – who are more likely to follow the law because of their "increasing professionalism . . . and the possibility of internal discipline." U.S. Br. 10, 28.

Even absent direct intimidation, "some inmates . . . react to their vulnerability by volunteering false stories of past criminal behaviour to other inmates. They may feel that such fabrications are necessary in order to boost their standing within the prison community and reduce the threats to their personal safety." Sherrin, *supra*, at 116 (citing Elizabeth Ganong, *Involuntary Confessions and the Jailhouse Informant: An Examination of* Arizona v. Fulminante, 19 HASTINGS CONST. L.Q. 911, 928 (1992)). In *Arizona v. Fulminante*, for instance, this Court recognized that a defendant's jailhouse confession to a snitch had been coerced. 499 U.S. 279, 285-88 (1991). The Court held that even a promise by the snitch to protect the defendant could constitute coercion because "it was fear of physical violence, absent protection from his friend (and Government agent) [the snitch], which motivated [the defendant] to confess." *Id.* at 288.

III. At A Minimum, Informant Testimony Should Not Be Admitted Unless It Is Corroborated.

Given the inherent unreliability of snitch testimony, it should be inadmissible at trial when obtained in violation of the Sixth Amendment,

regardless whether the prosecution seeks to present the testimony as part of its case in chief or for impeachment purposes. At a minimum, however, snitch testimony should be admissible for impeachment purposes only if it satisfies a basic reliability requirement: corroboration. And such corroboration is not present in this case.

1. In other areas of the law, this Court has held that the Constitution requires exclusion of types of evidence that are especially prone to unreliability absent additional safeguards. Thus, for example, this Court has excluded identifications obtained under unduly suggestive circumstances unless the identifications "possess[] sufficient aspects of reliability." *Manson v. Brathwaite*, 432 U.S. 98, 106 (1977).

A study commissioned by the American Bar Association has proposed an analogous safeguard to ensure reliability in cases involving snitch testimony: Reasoning that "'[t]he most dangerous informer of all is the jailhouse snitch who claims another prisoner has confessed to him,'" it recommended that "[c]orroboration [] be required in jailhouse informant cases; no person should lose liberty or life based solely on the testimony of such a witness." AMERICAN BAR ASSOCIATION, SECTION OF CRIMINAL JUSTICE, REPORT TO THE HOUSE OF DELEGATES 6 (2005) (quoting Judge Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 Hastings L.J. 1381, 1394 (1996)).

2. Such safeguards are available, as evidence from several other jurisdictions shows. For example, in the wake of a series of snitch-related scandals, the Los Angeles District Attorney's Office enacted a

policy that prohibited snitches from testifying "to a defendant's oral statement, admission or confession unless strong evidence exists which corroborates the [snitch's] truthfulness." STEVE COOLEY, LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE, LEGAL POLICIES MANUAL 187 (2005). District attorneys seeking to use a snitch must request written approval from a committee made up of the Office's senior leadership. *Id.* Texas also imposes corroboration requirements for police informants in some drug cases. *See* TEX. CODE CRIM. PROC. ANN. art. 38.141 (Vernon 2007).

Safeguards have also been imposed on the use of snitch testimony in Canada, where the Attorney General of Ontario permits prosecutors to use snitch testimony only "where this evidence is justified by a compelling public interest, founded on an objective assessment of reliability." CROWN POLICY MANUAL, IN-CUSTODY INFORMERS (Mar. 2005), *available at* http://www.attorneygeneral.jus.gov.on.ca/english/crim/cpm/2005/InCustodyInformers.pdf. In cases in which the use of snitch testimony is deemed necessary, the Attorney General's office "requires a rigorous, objective assessment of the informer's account of the accused person's alleged statement, the circumstances in which that account was provided to the authorities and the in-custody informer's general reliability." *Id.*

By contrast, Kansas provides none of these safeguards. In this case, for example, although law enforcement officials "recruited Doser to share a cell with Ventris and to 'keep [his] ear open and listen' for incriminating statements," Pet. App. 8a, the State failed to take any steps to ensure the reliability of

Doser's testimony by tape-recording conversations between the two cellmates or otherwise seeking to corroborate Doser's testimony.

3. The practicability of requiring corroboration, or other safeguards, for the admission of snitch testimony is also illustrated by a related development: the adoption of such measures in cases involving accomplice testimony. *Cf. Lee v. Illinois*, 476 U.S. 530, 546 (1986) (describing "the time-honored teaching that a co-defendant's confession inculpating the accused is inherently unreliable, and that convictions supported by such evidence violate the constitutional right of confrontation"). If anything, this development only strengthens the case for requiring such safeguards in snitch cases, since the problems with reliability here are even greater.

Sixteen states have statutes mandating corroboration for accomplice informants. Thirteen of those require corroboration for all accomplice testimony, regardless whether the informant was in custody.[6] California's law is illustrative: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with

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[6] ALASKA STAT. Ann. § 12.45.020 (West 2008); CAL. PENAL CODE § 1111 (West 2008); IDAHO CODE ANN. § 19-2117 (West 2008); IOWA CODE ANN. § 813.2 (West 2008); IOWA CT. RULES, R. 2.21(3); MINN. STAT. ANN. § 634.04 (West 2008); MONT. CODE ANN. § 46-16-213 (2007); NEV. REV. STAT. ANN. § 175.291 (West 2007); N.Y. CRIM. PROC. LAW § 60.22 (McKinney 2008); N.D. CENT. CODE § 29-21-14 (2007); OR. REV. STAT. ANN. § 136.440 (West 2008); S.D. CODIFIED LAWS ANN. § 23A-22-8 (2008); TEX. CODE CRIM. PROC. ANN. art. 38.14 (Vernon 2007).

the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." CAL. PENAL CODE § 1111 (West 2008). Three more states impose similar safeguards for accomplice testimony in felony cases. ALA. CODE § 12-21-222 (2008); ARK. CODE ANN. § 16-89-111(e) (West 2008); GA. CODE ANN. § 24-4-8 (West 2008) (corroboration also required when accomplice is sole witness in cases of treason or perjury). And Tennessee requires accomplice corroboration under common law. *See, e.g.*, *State v. Shaw*, 37 S.W.3d 900, 903 (Tenn. 2001) ("[A] conviction may not be based solely upon the uncorroborated testimony of an accomplice.").

In addition to the states that require some form of corroboration for accomplice testimony, an even greater number of states also require "cautionary jury instruction[s]" in cases involving accomplice testimony. AMERICAN BAR ASSOCIATION, *supra*, at 6; *see also* Sara Darehshori et al., *Empire State Injustice: Based upon a Decade of New Information, a Preliminary Evaluation of How New York's Death Penalty System Fails to Meet Standards for Accuracy and Fairness*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 85, 91 (2006).

This Court should not allow lower courts to admit unreliable jailhouse snitch testimony for impeachment purposes. But if the Court chooses to do so at all, it should at the very least require that these statements meet the same type of corroboration requirements that apply to confessions offered by accomplices that connect the defendant with the charged offense. Here, too, Kansas falls far short of the norm.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Kansas should be affirmed.

Respectfully submitted,

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